No. 85-495

In The
Supreme Court of the United States
October Term, 1985

ANSONIA BOARD OF EDUCATION, ET AL.,
Petitioners,

vs.

RONALD PHILBROOK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that respondent established a *prima facie* case of religious discrimination under Title VII based upon the petitioner school board's refusal to provide him with additional paid leave for religious observance?

2. Whether Title VII requires an employer, absent a showing of undue hardship, to accept an employee's proposed accommodation to the employee's religious beliefs where the employer has already made a reasonable accommodation to those beliefs?

LIST OF PARTIES

Petitioners are the Ansonia Board of Education, Nicholas Collicelli, Dr. Charles J. Connors, Kenneth Eaton, William Evans, Del Matricaria, Susan Schumacher, Faith Tingley, and Robert E. Zuraw.

Respondents are Ronald Philbrook, Ansonia Federation of Teachers, Local 1012, AFL-CIO; Jose Neves, Kathleen Roberts, Mary Ghirardini, Dennis Gleason, Dominick Golia, Maureen Wilkinson and Georgette Williams.

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OPINIONS BELOW

The opinion of the court of appeals (App. to Pet. for Cert. A, 1a-24a) entered March 7, 1985, is reported at 757 F.2d 476. The opinion of the district court (App. to Pet. for Cert. C, 26a-37a) is not reported.

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JURISDICTION

The decision of the Court of Appeals for the Second Circuit (App. to Pet. for Cert. A, 1a-24a) reversing the judgment of the district court was entered March 7, 1985. A petition for rehearing was denied (App. to Pet. for Cert. B, 25a) on June 7, 1985. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 25, 1985. The petition for a writ of certiorari was filed on September 20, 1985 and was granted on January 21, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

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STATUTES INVOLVED

Amendment 1 of the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Title VII of the Civil Rights Act of 1964, As Amended (excerpts) Section 703(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-(2)a.

Section 701(j):

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e (j).

Guideline § 1605.2(c) of the United States Equal Employment Opportunity Commission ("E.E.O.C."):

When there is more than one method of accommodation available which would not cause undue hardship, the commission will determine whether the accommodation offered is reasonable by examining:

(i) the alternatives for accommodation considered by the employer or labor organization; and

(ii) the alternatives for accommodation, if any, actually offered to the individual requiring the accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer

or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities. 29 C.F.R. § 1605.2(c) (1985).

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STATEMENT OF FACTS

The plaintiff-respondent, Ronald Philbrook, has been employed by the defendant-petitioner, Ansonia Board of Education, as a high school business teacher since 1962. (J.A. 4-15, 17) In 1968, Philbrook was baptized a member of the Worldwide Church of God, the tenets of which require that members refrain from servile work on designated holy days as a condition of receiving eternal life. (J.A. 17-18)

Since the 1967-68 school year, collective bargaining agreements between the Ansonia Board of Education and the Ansonia Federation of Teachers, Local 1012, AFL-CIO, the bargaining representative of Ansonia teachers, have entitled Philbrook and other teachers in Ansonia to three days of paid leave to observe religious holidays. (J.A. 71-101) Since the 1969-70 school year, Philbrook and other teachers in Ansonia have been provided eighteen days leave per year for illness, which leave is cumulative to 180 days. (J.A. 76-101) The three days of paid leave to observe religious holidays are not charged against a teacher's annual accumulation of paid leave. Thus, a teacher who chooses to take three days of paid leave for the observance of religious holidays is still entitled to eighteen additional days of paid leave. (*Ibid*)

A teacher's eighteen days of annual leave may also be used for purposes other than illness as follows: five days for a death in the immediate family, one day to attend the funeral of a friend, one day to attend a wedding in the immediate family, one day to attend a graduation ceremony, and three days to attend to "necessary personal business." (*Ibid*) Pursuant to the explicit language in the collective bargaining agreements since 1969, the three days allotted for "necessary personal business" may not be used for those reasons for which paid leave is otherwise provided nor may these days be used for activities which may be scheduled during other than working hours. (J.A. 53-54, 64-65) To insure that Ansonia teachers conform to the job attendance rules, the school administration monitors the use of all types of leave by requiring teachers to declare the reason for the absences in writing. (J.A. 52, 152-156) Absences are subject to approval by the Superintendent's office. (*Ibid*) Since the 1978-79 school year, teachers have been allowed to take one day of the three days of necessary personal business leave without advance approval. (J.A. 94-101) Teachers, however, are cautioned that this one day of necessary personal business leave may not be used for reasons for which leave is provided under the collective bargaining agreement. (J.A. 64-65) A teacher who violates the leave provisions risks being disciplined. (J.A. 164) In addition, a teacher whose absence is not excused or who is absent for more than the number of days allotted under the leave provisions of the bargaining agreement is docked a day's pay for each absence. From the 1967-68 to 1970-71 school year the amount docked was equivalent to 1/200 of the teacher's annual salary. (J.A. 73-81) Since the 1971-72 school year, a teacher absent for

an unexcused reason has been docked an amount equal to 1/180 of his annual salary. (J.A. 82-101)

Under the terms of the collective bargaining agreements governing since 1974, teachers have been required to request leave for necessary personal business forty-eight hours prior to such leave. (J.A. 88-101) With regard to absences arising from illness or emergencies, an Ansonia teacher is required to contact an answering service on the morning of his absence to notify the school administration so that a substitute may be employed. (J.A. 55-56). Ansonia has had difficulty in obtaining certified substitutes and, more particularly, substitutes certified to teach the business courses for which Philbrook is responsible. (J.A. 56) As Philbrook admits (J.A. 194), and as the Superintendent of Schools, Robert Zuraw, testified (J.A. 57), little learning occurs when a substitute is called upon to take over a class. Moreover, substitutes have generally had difficulty in maintaining classroom discipline and on a number of occasions school property in Philbrook's classes has been damaged by students when substitutes have been in charge of the class. (J.A. 57-59)

As a member of the Worldwide Church of God, Philbrook is required to refrain from work on three to six days during the work year.[1] (J.A. 20) Dissatisfied with the existing work requirements, Philbrook has requested that he be exempted from the restrictions in the collective bargaining agreement which limit the number of days of paid leave available for religious observance. (J.A. 105) In the

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[1] Although Philbrook testified that his religion requires that he be absent from school three to six days per year (J.A. 20), during the 1974-75 school year he was absent ten days for religious reasons (P.X.-14).

alternative, Philbrook requests that he be allowed to pay the cost of a substitute instead of being docked a day's pay. (J.A. 23) In order to accommodate Philbrook's need to refrain from work on more than three days, the school board has waived the job attendance requirements and allowed him to be absent without pay beyond the three days paid leave guaranteed under the collective bargaining agreement. (J.A. 54) From the 1970-71 school year to the present, Philbrook has consistently availed himself of the religious leave sections of the agreement, taking three days of paid leave in each school year. (PX-18) It has been the practice of the school board to deduct a day's pay from Philbrook's salary for each day in excess of the three claimed by Philbrook to have been taken for the observance of holy days. (J.A. 53-54) However, since the 1976-77 school year no pay has been deducted because Philbrook has either chosen not to take a day off without pay in order to observe holy days or has scheduled hospital visits on holy days thus causing absences to be charged to his sick leave entitlement.[2] (J.A. 36-37)

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[2] One other teacher, an Orthodox Jew, has received a salary deduction for absences in excess of three occurring as a result of her religious observances. (J.A. 54-55) A summary of Philbrook's absence records and salary data is contained in the appendix, *infra*.

SUMMARY OF ARGUMENT

A. Philbrook contends that the school board's refusal to grant him paid leave to observe all of his religious holidays constitutes religious discrimination in violation of Title VII. Under standards articulated by this Court in cases involving the free exercise clause of the first amendment, which are instructive in construing Title VII's ban on religious discrimination, and in cases specifically dealing with discrimination within the context of Title VII, Philbrook has not established a *prima facie* case of religious discrimination.

The bargaining agreement covering the school board's teachers contains leave provisions which are facially neutral in that they provide all teachers three days paid leave for religious observance, additional paid leave for other specified secular reasons, and three days necessary personal business leave. Because Philbrook is neither required to choose between his employment status and his religion, nor required to forego a benefit to which he would otherwise be entitled because of his religion, he has not established a case of discrimination based on religion. Cf. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981). See also *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984). Far from operating to discriminate against Philbrook, the school board's provision of three days paid leave to all teachers for religious observance and three days paid leave for necessary personal business constitutes a significant accommodation to both the secular and religious needs of the school board's teachers. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 70 (1975). The fact that the school board has further accommodated Philbrook by providing him leave without pay for religious observance in addition

to the three days paid leave guaranteed under the bargaining agreement only serves to weaken his claim of discrimination.

Philbrook also contends that the school board's leave provisions are discriminatory because the bargaining agreement's provision of three days paid leave for religious observance does not meet his need for religious leave while the needs of some of the school board's teachers are fully met. However, discrimination on the basis of religion does not arise merely because the school board's leave provisions are "less than all inclusive." Cf. *General Electric Company v. Gilbert*, 429 U.S. 125, 138-139 (1977). To hold otherwise would require an employer who has no paid leave program at all to provide employees all the paid leave they need for religious observance in order to avoid a violation of Title VII. Finally, Philbrook has not shown that he would have been treated differently in the provision of paid leave benefits but for his religion. Cf. *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978).

Not only has there been no discrimination against Philbrook, but Philbrook has been receiving an additional benefit, unpaid leave beyond the three days paid leave guaranteed under the bargaining agreement for religious observance. Accommodating Philbrook in either of the ways he prefers by providing him whatever paid leave he needs for religious observance or paid leave less the cost of hiring a substitute, would result in the subsidizing of his religious beliefs contrary to the purposes of Title VII and must inevitably give rise to a serious constitutional question under the establishment clause. Cf. *Estate of*

Thorton v. Caldor, Inc., — U.S. —, 105 S.Ct. 2914, 2918 (1985) (O'Connor, J., concurring).

B. The holding of the court of appeals that even if an employer has reasonably accommodated an employee's religious beliefs, the employer must nevertheless implement the accommodation the employee prefers unless the employer can demonstrate undue hardship, is not supported by the plain language of Title VII or its legislative history. Under Title VII's religious accommodation provisions, once an employer has proposed or implemented a reasonable accommodation, the statutory inquiry ends. The extent of undue hardship on an employer is considered under Title VII only where an employer has been unwilling or claims it is unable to accommodate reasonably an employee's religious beliefs. Cf. *Pinsker v. Joint District No. 28J*, supra; *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982).

Even if the school board is required to consider Philbrook's accommodation proposals, it is clear that either proposal would create undue hardship on the school board's business. In *Trans World Airlines v. Hardison, supra*, this Court stated that an accommodation proposal which requires an employer to incur more than a "*de minimis*" cost results in undue hardship to the employer. The potential costs to TWA in *Hardison* involved the payment of higher wages and a loss in business efficiency. Monetary costs similar to those which would have been incurred by TWA will be incurred by the school board if it is required to accommodate Philbrook in the manner he prefers. When these costs are coupled with the decrease in efficiency in the operation of the school system, which is already being incurred as a result of Philbrook's absences, it is clear

that undue hardship would result if either of Philbrook's proposals is implemented.

Implementation of Philbrook's proposals would also result in abrogation of the collective bargaining agreement covering the school board's teachers. The bargaining agreement, like predecessor agreements, limits teachers to three days paid leave for religious observance. These agreements also provide three days paid leave for "necessary personal business" but none of these days may be used for any of the reasons for which leave is otherwise provided in the bargaining agreement, including religious observance. If the school board is required to allow Philbrook to use his three days of necessary personal business leave for religious observance, the board will be required to depart from the collective bargaining agreement and, consequently, to forego its bargain with the union. In light of the strong national policy in favor of preserving the integrity of collective bargaining agreements, Title VII does not require an employer to abrogate an otherwise valid bargaining agreement absent a showing of an intent to discriminate. *Trans World Airlines v. Hardison*, 432 U.S. at 79. Cf. *Steelworkers v. Weber*, 443 U.S. 193 (1979).

Requiring the school board to implement either of Philbrook's accommodation proposals would also result in his being compensated for additional days of absence because of religious needs while other teachers are denied a similar benefit for secular needs. The result would be to place a premium on Philbrook's religious beliefs in the allocation of paid leave contrary to the purpose of Title VII. Such preferential treatment would advance Philbrook's religion in violation of the establishment clause of the first amendment.

ARGUMENT

I. PHILBROOK HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION UNDER TITLE VII BASED UPON THE SCHOOL BOARD'S REFUSAL TO PROVIDE HIM WITH ADDITIONAL PAID LEAVE FOR RELIGIOUS OBSERVANCE.

Section 703(a)(1) of the Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e-2(a) makes it an unlawful employment practice for an employer to discriminate against an employee because of the employee's religion. The statute specifically prohibits discrimination with respect to compensation, terms, and privileges of employment, 42 U.S.C. §2000e-2(a)(1), and forbids an employer from limiting an employee "in a way which would deprive or tend to deprive that employee of employment opportunities or otherwise adversely affect his or her status as an employee" because of the employee's religion, 42 U.S.C. § 2000e-2(a)(2). If such discrimination in employment is found to exist, Title VII requires the employer to accommodate reasonably the employee's "religious observance or practice" unless to do so would result in "undue hardship on the conduct of the employer's business" 42 U.S.C. §2000e(j).

Before an employer may be called upon to attempt to accommodate an employee's religious beliefs, the employee must demonstrate that the employer's work requirements penalize him or her because of religion so as to constitute a violation of Title VII.[3] Philbrook contends that the

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[3] While the standard of proof required to establish a *prima facie* case of religious discrimination under Title VII has not been

(Continued on following page)

school board's refusal to grant him paid leave to observe all of his religious holidays discriminates against him on the basis of religion in violation of Title VII.[4] This claim is without merit because the school board's religious leave practices are facially neutral, do not unduly burden Philbrook in the practice of his religion and do not require him to forego employee benefits because of his religion. Under the standards articulated by this Court in cases involving the free exercise clause of the first amendment,

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articulated by this Court, the courts of appeals have generally interpreted Title VII to require that a plaintiff prove the following elements: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she has informed the employer of this belief; (3) he or she was disciplined for failing to comply with the conflicting employment requirement. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 481 (2nd Cir. 1985), *cert. granted*, 106 S. Ct. 848 (1985) (App. to Pet. for Cert. at 9a); *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984) (court sustained district court's conclusion that employee had failed to establish *prima facie* case because unpaid leave for religious holidays was not disciplinary); *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022 (5th Cir. 1984) (court concluded that discharge for failure to attend work on religious holiday amounted to discipline); *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982) (employer conceded that employee's proof of discharge for failure to attend work on religious holiday established a *prima facie* case).

[4] Philbrook's complaint implicates both Section 703(a)(1) and Section 703(a)(2) of Title VII. In *Nashville Gas Co. v. Satty*, 434 U.S. 136, 145 (1977), this Court noted that Section 703(a)(1) "appear[s] to be the proper section of Title VII under which to analyze questions of sick-leave or disability benefits." It is submitted that Section 703(a)(1) also appears to be the proper section under which to analyze questions involving other leave benefits. Because this Court has not stated whether a showing of intentional discrimination or disparate impact is required to prove a claim under either Section 703(a)(1) or Section 703(a)(2), *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 709, 710-11 n.20 (1978); the petitioners will analyze Philbrook's claim from both perspectives.

which are instructive in construing Title VII's ban on religious discrimination, and in *General Electric Company v. Gilbert*, 429 U.S. 125 (1977) and *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 709 (1978), which specifically dealt with discrimination within the context of Title VII, it is clear that no violation of that statute's ban on religious discrimination has occurred.

A. The school board's leave practices do not conflict with Philbrook's religious beliefs.

In *Thomas v. Review Board*, 450 U.S. 707 (1981), this Court held that a statute may offend the free exercise clause when the purpose or effect of the statute unduly burdens an individual in the practice of his religion. This holding is consistent with that in *Sherbert v. Verner*, 374 U.S. 398 (1963) where an individual was denied unemployment compensation benefits because she refused, as a matter of religious principle, to work on Saturday. This Court struck down the denial of benefits in *Sherbert* because the unemployment compensation scheme forced the applicant to choose "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand", thereby penalizing the applicant in the exercise of first amendment rights. 374 U.S. at 404. While *Thomas* and *Sherbert* involved the free exercise clause rather than Title VII's prohibition against religious discrimination in employment, the test for establishing a *prima facie* case of a free exercise violation as articulated in those cases should be employed in determining whether impermissible discrimination has been shown under Title VII; both the application of free exercise considerations within the employment context and Title VII's ban on religious discrimination in employment involve conflicts between individual religious practices and the receipt of an employment related benefit or opportunity.[5]

In light of *Thomas* and *Sherbert*, the school board's leave practices do not impose an undue burden on Philbrook's religious beliefs nor do they effectively penalize him in the practice of his religion by forcing him to choose between the precepts of his religion and benefits which would otherwise be available. Philbrook has not been required to choose between his religion and employment with the school board; in addition, he receives all benefits granted other teachers in the school system as well as an additional benefit, unpaid leave for religious observance. See, *Pinsker v. Joint District 28J*, 735 F.2d 388 (10th Cir. 1984), citing, *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday closing laws constitute permissible, incidental burden on religion.)

B. The school board's provision of three additional days of paid leave to all teachers for religious observances constitutes a significant accommodation to Philbrook's religious needs.

The mere fact that the leave provisions in the governing collective bargaining agreements distinguish between paid leave for "necessary personal business" and paid

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[5] See Note, *Religious Discrimination in the Work Place: A Comparison of Thomas v. Review Board and Title VII cases*, 33 Syracuse Law Review 843 (1982) (suggesting that courts should adopt a uniform approach to analyzing free exercise and Title VII cases which involve charges of religious discrimination in the work place).

leave for religious observance with a specific number of days allotted for both categories of leave does not render the provisions discriminatory. The employment policies of the school board are facially neutral and provide leave benefits to all teachers regardless of their religious beliefs to observe religious holidays and to pursue secular interests. The leave provisions also provide three days' paid leave to teachers regardless of their religious beliefs for necessary personal business reasons for which leave is not otherwise provided under the contract. Far from operating to deny Philbrook any employment benefit to which he would otherwise be entitled except for his religion, the school board's provision of three days paid leave to all teachers for religious observance constitutes a significant accommodation to both the secular and religious needs of the school board's teachers. Cf. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 78 (1975). While some disparity in treatment between employees is permissible when an employer seeks to accommodate reasonably an employee's religious beliefs, this Court has noted that Title VII does not contemplate preferential treatment. *Id.* at 81. In this regard, it is important to recall that Title VII's ban on religious discrimination was enacted to ensure that similarly situated employees are not treated differently solely because they differ with respect to religion. *Id.* at 71. In applying the statute, this Court has noted that "Title VII strives to achieve *equality of opportunity* by rooting out artificial, arbitrary and unnecessary employer

created barriers to professional development." *Connecticut v. Teal*, 457 U.S. 440, 451 (1982) (emphasis added). Thus, as the dissenting member of the panel in this case observed, the leave policy at issue does not violate Title VII because it does not make distinctions between employees, deny Philbrook employment opportunities, or adversely affect his employment status. *Philbrook v. Ansonia Board of Education*, 757 F.2d at 488 (App. to Pet. for Cert. at 22a) (Pollack, J., dissenting). The fact that the school board has further accommodated Philbrook by providing him leave without pay to observe religious holidays only serves to weaken his claim of discrimination.[6]

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[6] The court of appeals appears to have concluded that the Ansonia leave policies are "facially" discriminatory because they prohibit the use of necessary personal business leave for "any religious activity," thus "afford[ing] some teachers all the leave they need for religious reasons while not extending that benefit to members of religious groups that have more than three holy days per year." *Philbrook v. Ansonia Board of Education*, 757 F.2d at 483 (App. to Pet. for Cert. at 12a) This conclusion is objectionable for two reasons: first, there is no evidence in the record that the leave provisions were *designed* to prefer one religious group over another. And second, the court of appeals' view of the prohibition against the use of necessary personal leave for religious observance as facially discriminatory also overlooks the parity in the leave provisions which recognize both secular and religious needs. The leave provisions not only are facially neutral but also have the effect of preferring Philbrook in his religious needs over members of religious faiths which do not observe holy days on work days and non-adherents who do not observe any religious holidays. In addition, since days for religious observance are not charged against annual leave, the leave provisions operate to provide Philbrook 21 days of annual paid leave whereas teachers who do not need to be absent on work days to observe religious holidays only receive 18 days of paid leave each year.

C. Discrimination does not arise under Title VII merely because the school board's leave provisions are "less than all inclusive."

Philbrook claims that limiting paid leave for religious observance to three days has a discriminatory effect because while some teachers need no more than three days leave for this purpose, he needs more. However, that the bargaining agreement's provision for paid leave for religious observance does not satisfy those employees who desire more than three days paid religious leave does not mean that these provisions discriminate because of religion. All teachers, regardless of faith, are entitled to take three days paid leave to observe religious holidays and three days to attend to necessary personal business. Philbrook's need for additional absences does not destroy the presumed parity of leave benefits. It is true that, as applied to Philbrook, the school board's leave provisions are not all inclusive in the sense that Philbrook does not have all of the paid leave for religious observance he desires. However, discrimination on the basis of religion does not arise merely because the school board's leave provisions are "less than all inclusive." Cf. *General Electric Company v. Gilbert*, 429 U.S. 125, 138-139 (1977).

In *Gilbert*, the defendant employer provided non-occupational sickness and accident benefits to all employees, but did not allow the use of these benefits for disabilities arising from pregnancy. A class of female plaintiffs claimed that the exclusion constituted sex discrimination in violation of Title VII. This Court held that the plaintiffs had failed to establish a *prima facie* case of gender-based discrimination.

> For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not *destroy the presumed parity of the benefits*, accruing to men and women alike, which results from the facially evenhanded inclusion of risks. To hold otherwise would endanger the common sense notion that an employer who has no disability benefits program at all does not violate Title VII even though the "underinclusion" of risk impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than another.

Id. at 139-140 (emphasis added).[7] A reading of Title VII's religious accommodation provisions which would require Philbrook to be provided all the paid leave he needs for religious observance would similarly endanger the common sense notion that an employer who has no paid leave program at all, but provides unpaid leave for religious observance, does not violate Title VII even though the "underinclusion" of risk impacts, as a result of an employee's religious beliefs, more heavily upon the adherents of one religion than those of another.

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[7] The court of appeals rejected the school board's reliance on *Gilbert*, claiming that this Court recognized in *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 462 U.S. 669 (1983) that Congress, in enacting the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), not only overturned the holding of *Gilbert* but also rejected this Court's reasoning in that case on the issue of establishing a *prima facie* case of discrimination under Title VII. 757 F.2d at 483 (App. to Pet. for Cert. 12a). However, it is clear from a reading of *Newport News* as well as the legislative history behind the Pregnancy Discrimination Act, as set forth in the Court's opinion, that Congress only rejected this Court's determination of what constitutes sex discrimination under Title VII. 432 U.S. at 678-682. This Court's analysis in *Gilbert* of the elements of a *prima facie* case of discrimination under Title VII within the context of employment benefits continues to have viability, at least to the extent that gender-based discrimination is not in issue.

Philbrook has also failed to prove a *prima facie* case of discrimination in light of this Court's holding in *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). In *Manhart*, this Court held that the employer's requirement that female employees contribute more to the employees' pension fund than male employees violated Title VII. The differential was held unlawful as a violation of Title VII because it would not have been required of female employees but for their sex.

> An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which *but for* that person's sex would be different."

435 U.S. at 711 (footnote omitted, emphasis added).

Philbrook's claim of discrimination does not withstand scrutiny when the "but for" test of *Manhart* is applied. Philbrook has not shown that he would have been treated differently in the allocation of paid leave benefits but for his religious beliefs and therefore he has failed to establish a *prima facie* showing of a violation of Title VII. Not only has there been no discrimination in this case, but also Philbrook has received and continues to receive a benefit not available to other teachers, whatever unpaid leave he needs for religious observance beyond the three days of paid leave guaranteed under the bargaining agreement.

Philbrook contends that because the school board has allotted to employees a generous portion of paid leave, Title VII requires the board to be more generous and to

underwrite all of his absences arising for religious reasons. However, the failure to provide such a benefit does not support a charge of discrimination under Title VII. Cf. *Sherbert v. Verner*, 374 U.S. at 412 (Douglas, J., concurring) ("[t]he fact that government cannot exact from [an individual] a surrender of one iota of [his] religious scruples does not, of course, mean that [he] can demand of government a sum of money, the better to exercise them.") See also *Johnson v. Robison*, 415 U.S. 361, 385 (1974). Title VII should not be construed to require an employer to facilitate an employee's exercise of his religious beliefs by subsidizing those beliefs simply because the employer has chosen to subsidize other employee activities in a facially even-handed manner beneficial to every employee. A contrary holding would not only require the school board to subsidize Philbrook's religious practices but would also require an employer who provides no form of paid leave to compensate employees for absences taken to observe religious holidays. Such a construction of Title VII, which follows logically from the holding of the court of appeals in this case, must inevitably give rise to a serious constitutional question under the establishment clause. Cf. *Estate of Thorton v. Caldor, Inc.*, — U.S. —, 105 S.Ct. 2914 (1985) (O'Connor, J., concurring).

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ARGUMENT

II. TITLE VII DOES NOT REQUIRE AN EMPLOYER TO ACCEPT AN EMPLOYEE'S PROPOSED ACCOMMODATION TO THE EMPLOYEE'S RELIGIOUS BELIEFS WHERE THE EMPLOYER HAS ALREADY MADE A REASONABLE ACCOMMODATION TO THOSE BELIEFS.

A. Once an employer has proposed a reasonable accommodation of the employee's religious practices, the statutory inquiry ends.

The court of appeals has stated that even if it is assumed that the Ansonia school board has reasonably accommodated Philbrook's religious beliefs by granting him paid and unpaid leave,[8] it is nevertheless required by Title VII to accept the proposal Philbrook prefers unless to do so would result in undue hardship on the conduct of the school board's business. *Philbrook v. Ansonia Board of Education*, 757 F.2d at 484. (App. to Pet. for Cert. at 14a) Though consistent with current EEOC guidelines[9], this

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[8] Providing Philbrook three days paid leave and additional unpaid leave for required absences due to religious beliefs exceeds the requirements of Title VII. In *Hardison*, this Court ruled that the collective bargaining agreement's seniority provisions appeared to "represent a significant accommodation to the needs, both religious and secular, of all of TWA's employees . . . ." 432 U.S. at 78. Presumably, the leave provisions in the school board's bargaining agreement similarly represent a significant accommodation to the religious and secular needs of all of the school board's teachers.

[9] The court of appeals relied upon current EEOC guidelines in support of its conclusion that the duty to accommodate "cannot be defined without reference to undue hardship." 757 F.2d at 484. (App. to Pet. for Cert. at 14a) These guidelines are set forth at 29 C.F.R. § 1605.2(c)(2) and are reproduced at page viii

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reading of Title VII's religious accommodation requirement is at variance with the plain language of the statute.

Title VII requires an employer to accommodate reasonably an employee's religious beliefs unless to do so would result in undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j) Once an employer has either proposed or implemented a reasonable accommodation, the statutory inquiry ends. Neither the language nor the legislative history of Title VII supports the court of appeals' suggestion that an employer has not met its statutory burden by proposing or implementing a reasonable accommodation, but must, instead, accept the accommodation the employee prefers, absent a showing of undue hardship.[10]

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of this brief. As this Court has noted, in enacting Title VII, Congress did not confer upon the EEOC authority to promulgate rules or regulations. Courts may, therefore, accord less weight to agency guidelines than to administrative regulations which Congress has given the force of law. *Trans World Airlines v. Hardison*, 432 U.S. at 76 n.11, *General Electric Co. v. Gilbert*, 429 U.S. at 141.

[10] In examining the reasonable accommodation requirement, other courts of appeals have interpreted the provisions as requiring that an employee must try to accommodate his beliefs himself through existing mechanisms or request that the employer offer an accommodation. *Pinsker v. Joint District No. 28J*, 735 F.2d 388, 390-391 (10th Cir. 1984) (employer reasonably accommodated employee where it provided him unpaid leave for religious worship); *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982) (employer met its burden where it demonstrated employee failed to use existing flexible scheduling system and failed to cooperate with employer efforts to reconcile a conflict); *Chysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978) (employee waived right to have beliefs accommodated by employer where the

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The court of appeals' reading of Title VII is apparently based on the conclusion that the employer's duty to accommodate cannot be "defined without reference to undue hardship." 757 F.2d at 484 (App. to Pet. for Cert. at 14a) (See Footnote 9, *supra*). But under the plain language of the statute, the extent of undue hardship is considered under Title VII only where an employer has been unwilling or claims it is unable to accommodate reasonably an employee's religious beliefs. When the employer has proposed or implemented a reasonable accommodation in the first instance the statute does not require an employer to show undue hardship to justify a refusal to make an additional accommodation.

Even if Philbrook has established a *prima facie* case of religious discrimination, the school board has accommodated Philbrook's religious beliefs in a reasonable manner by granting him three days leave with pay and additional days without pay. This form of accommodation was found to be reasonable in *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984); *Rankins v. Commission on Professional Competence of Ducor*, 154 Cal. Rptr. 907, 593 P.2d 852 (1979); and in *California Teach-*

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employee failed to use existing leave provisions and failed to cooperate with employer's conciliatory efforts). Compare, *American Postal Workers v. Postmaster General*, 781 F.2d 772 (9th Cir. 1985).

The Second Circuit erroneously concluded that the *Brener* court, by implication, approved the concept that Title VII requires an employer to accept an employee's proposal. The court misinterpreted *Brener* and failed to address the language in that opinion which specifies that an employee has a duty to attempt to accept the employer's proposal. *Brener v. Diagnostic Center Hospital*, 671 F.2d at 145, 146.

ers' Association v. Board of Trustees, 70 Cal. App. 3rd 431, 138 Cal. Rptr. 817 (1977). Allowing Philbrook to take absences without pay does not hamper him in the exercise of his religious beliefs and fully discharges the school board's obligation to accommodate under Title VII.

B. Even if the school board is required to consider Philbrook's proposals, the implementation of those proposals would cause the school board undue hardship.

Even if the implementation of a reasonable accommodation to Philbrook's religious beliefs does not end the statutory inquiry as the court of appeals asserts, 757 F.2d at 484 (App. to Pet. for Cert. 14a-15a), it is clear that accepting either of Philbrook's accommodation proposals would cause the school board undue hardship.[11] In *Hardison*, this Court stated that an accommodation proposal which requires an employer to incur more than "*de minimis*" costs results in undue hardship to the employer. 432 U.S. at 84. Such potential "costs" to the employer in

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[11] Similarly, if the analysis adopted by this Court in *Sherbert* and *Thomas* were applied to this case and if Philbrook had established a *prima facie* case under those decisions, the school board would be able to rebut his case by demonstrating that it has a compelling interest in maintaining its current leave policy. See, *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion) (Sunday closing law resulting in loss of one day's pay per week sustained because state had interest in maintaining a uniform day of rest). The Board's compelling interest in this case would be in promoting educational excellence. *Horton v. Meskill*, 172 Conn. 615 (1977) (local school boards have a duty to provide quality education); and in maintaining the integrity of its collective bargaining agreement, *Trans World Airlines v. Hardison*, 432 U.S. at 79 (collective bargaining resulting in enforceable agreements "lies at the core of our national labor policy . . . .").

Hardison would have involved the payment of higher wages and a loss in business efficiency resulting in undue hardship. In the instant case, implementing either of Philbrook's suggested accommodations would result in undue hardship because the school board will incur more than a *de minimis* cost. Providing Philbrook with three days additional paid leave, the accommodation he prefers, would have cost the school board $413 during the 1983-84 school year.[12] Even Philbrook's alternate proposal, three days paid leave with the cost of hiring a substitute deducted from his pay, would have cost the board $338[13] during that school year. Under the standards set forth in *Hardison,* these costs are clearly more than *de minimis.*[14] It should also be noted that the school board would continue to incur costs in terms of a loss of school system efficiency should it be required to accommodate Philbrook in the manner he suggests. As the Superintendent of Schools testified, there are no qualified substitutes for business classes available; consequently, when Philbrook is absent from work, virtually no teaching takes place. (J.A. 57-59) The resulting loss of efficiency in terms of the educational

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[12] During the 1983-84 school year Philbrooks' salary was $24,810. (J.A. 102) Ansonia teachers were docked 1/180 of their annual salary for absences taken in excess of the paid leave days set forth in the collective bargaining agreement. (J.A. 101)

[13] The cost of hiring a non-certified substitute during the 1983-84 school year was $25 per day. (J.A. 124)

[14] The cost to TWA of accommodating Hardison resulting from the payment of higher wages would have been $150 for a three month period. 432 U.S. at 92 n.6 (Marshall, J., dissenting). The cost to the school board in order to implement either of Philbrook's accommodation proposals would be similar in financial terms and, when coupled with the loss of efficiency in terms of the educational process, would clearly constitute undue hardship.

process is apparent. That the school board now voluntarily incurs this particular cost by virtue of the accommodation already in place does not alter the fact that such a cost is a significant element of undue hardship.[15] Under the Court's ruling in *Hardison,* an employer cannot be compelled to incure such a cost. Consequently, to require implementation of either of Philbrook's proposals would conflict with this Court's ruling in *Hardison* and effectively penalize the school board for efforts already made to accommodate Philbrook's religious practices.

Philbrook's accommodation proposals would also require the school board to abrogate its bargaining agreement with the Ansonia Federation of Teachers in order to provide him with the additional paid leave he desires. As this Court noted in *Hardison,* "collective bargaining aimed at effecting workable and enforceable agreements between management and labor lies at the core of our national labor policy . . . ." 432 U.S. at 79. The current bargaining agreement, as well as previous agreements, have limited teachers to three days paid leave for religious observance. (J.A. 71-101) The bargaining agreement also provides three days paid leave for "necessary personal business," but none of these days may be used for any of

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[15] The present case does not involve a conflict between religious beliefs and job requirements resulting in discharge from employment. However, if the school board had conditioned Philbrook's continued employment on meeting the attendance requirements imposed on other teachers, it is clear that it could have justified a decision to discharge him based upon the showing of undue hardship on the record in this case. Indeed, under its previous guidelines, the EEOC had determined that "undue hardship may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of his absence for sabbath observance." 29 C.F.R. § 1605.1 (1968).

the reasons for which leave is otherwise provided in the agreement, including religious observance. If the school board is required by Title VII to allow Philbrook to use these leave days for religious observance, it will be required to alter the terms of the bargaining agreement. While the record suggests that the union would have no objection to amending the bargaining agreement to accommodate Philbrook (J.A. 66), the school board has reason to object to such an amendment since it would thereby be required to forego the benefit of its bargain with the union. As this Court stated in *Hardison*, "neither a collective bargaining contract nor a seniority system may be employed to violate the statute [footnote omitted], but we do not believe that the duty to accommodate requires [the employer] to take steps inconsistent with the otherwise valid agreement." 432 U.S. at 79. Cf. *Steelworkers v. Weber*, 443 U.S. 193 (1979).

C. Implementation of Philbrook's proposals would also lead to preferential treatment contrary to the intent and purpose of Title VII.

Requiring the school board to implement either of Philbrook's accommodation proposals, additional leave with full pay or additional paid leave less the cost of a substitute, would not only conflict with this Court's holding in *Hardison* on the question of undue hardship, but also result in preferential treatment contrary to the intent and purpose of Title VII. "The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin." 432 U.S. at 71. Allowing Philbrook to

be compensated for additional days of absence because of religious needs when other teachers are denied such a benefit for secular needs would place a premium on Philbrook's religious beliefs in the allocation of paid leave. Such preferential treatment would contravene the very purpose of Title VII. In order to avoid impermissible preferential treatment while at the same time accommodating Philbrook in the manner he prefers, the school board would have to amend the bargaining agreement to allow all teachers to use their three personal days for not only religious observance, but also any "necessary" secular purpose in order to avoid a conflict with the establishment clause of the first amendment.[16] The resulting increase in the availability of "necessary personal business leave" will likely lead to more teacher absences with a substantial increase in monetary cost to the school board and a decrease in the quality of education. Absent evidence that the leave provisions were intended to discriminate because of religion, this Court should not construe Title VII to require the school board to amend the agreement in order to accommodate Philbrook's religion, especially where to

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[16] The court of appeals expressed uncertainty about the "past and current scope of the personal leave provisions" of the bargaining agreement. 757 F.2d at 485 (App. to Pet. for Cert. at 16a). However, both the conduct of the parties and the specific terms of the bargaining agreement since 1970-71 make clear that paid personal leave has never been available to teachers beyond the three days specifically earmarked for religious observance in the bargaining agreement. One other teacher, an Orthodox Jew, has been docked for absences due to religious observance. (J.A. 54-55) Indeed, Philbrook, notwithstanding language in the decision of the court of appeals to the contrary, has been consistently docked for absences for religious observance beyond the three allowed by the various agreements. (J.A. 54)

do so would result in more than a *de minimis* cost to the employer.[17] Cf. *Trans World Airlines v. Hardison*, 432 U.S. at 82.

Whether or not mandated by Title VII, the preferential treatment which would result from the implementation of either of Philbrook's proposals would also violate the establishment clause of the first amendment because such treatment would have the effect of advancing religion. Under the establishment clause, neither a state nor the federal government can "pass laws which aid one religion, aid all religions or prefer one religion over another." *Everson v. Board of Education*, 330 U.S. 1, 15 (1947). If the school board were to grant special employment preferences to Philbrook based on his religious beliefs it would be using the "machinery of the state" to advance his religion, *Abington School District v. Schemp*, 374 U.S. 203, 226 (1963), and the board's action would fail the three-prong test of constitutionality articulated by this Court in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1975). Under that test, legislation must: (1) reflect a clearly secular purpose; (2) have a primary effect that neither inhibits nor advances religion; and (3) avoid excessive governmental entanglement with religion. *Id.* at 773. It is clear that implementation of either of Philbrook's proposed accommodations, both of

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[17] While the school board has no present intention of altering the accommodation it has made to Philbrook, *guaranteed* unpaid leave for religious observance in addition to the paid leave provided under the bargaining agreement, such an accommodation may also be inconsistent with Title VII's purposes since other teachers are not *guaranteed* unpaid leave for secular reasons beyond the paid leave provided in the agreement. (J.A. 164)

which would guarantee him paid leave beyond that available for other teachers solely because of his religious beliefs, would require the school board to alter existing work rules regarding paid leave solely because of Philbrook's religious beliefs. Such action would advance Philbrook's religion in violation of the first amendment.

CONCLUSION

For the foregoing reasons, the petitioners respectfully submit that this Court should reverse the judgment of the court of appeals and remand with instructions that Philbrook's complaint be dismissed.

Respectfully submitted,

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APPENDIX A

SUMMARY OF PHILBROOK ABSENCE RECORDS AND SALARY DATA[1]

Year	Leave Entitlement Annual/ Cumulative	No. of Days Absent	No. of Days Absent For Illness	No. of Days Absent for Personal Business	No. of Days Absent for Religious Reason	No. of Days Deducted For Religious Absences	Annual Salary	Per Diem	Amount Deducted From Annual Salary[2]
1970-71	18/180	20	11	3	6	3		1/200	
1971-72	18/180	21	13	3	5	2	$11,246.46	1/180	124.96
1972-73	18/180	18	11	2	5	2	12,922.50	1/180	143.58
1973-74	18/180	20	11	2	7	4	13,372.50	1/180	297.16
1974-75	18/180	23	12	0	10	7	15,582.08	1/180	605.97
1975-76	18/180	24	18	0	6	3	16,367.75	1/180	272.79
1976-77	18/180	21	18	0	3	0	17,261.67	1/180	0
1977-78	18/180	21	17	0	3	0	17,972.25	1/180	0
1978-79	18/180	22	18	0	3	0	18,506.67	1/180	0
1979-80	18/180	28	25	0	3	0	18,975.00	1/180	0
1980-81	18/180	21	18	0	3	0	19,475.00	1/180	0
1981-82	18/180	13	10	0	3	0	20,825.00	1/180	0
1982-83	18/180	13	5		3	0	22,720.00	1/180	0

(annual salary divided by per diem) x number of days deducted for religious absence = total salary deduction

[1]Compiled from P.X. 14, P.X. 15, D.X. D, and J.A. 79-101.

[2]The amount deducted from Philbrook's salary constitutes the amount deducted based on Philbrook's total annual salary. Because Philbrook's salary occasionally varied during the school year due to salary increases negotiated by the union, the amount actually deducted during the 1971-72 school year was $106.26 and during the 1974-75 school year was $580.37 (P.X. 15).